

Housing and Property Chamber
First-tier Tribunal for Scotland



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland
(Housing and Property Chamber) under Regulation 9 of the Tenancy Deposit
Scheme (Scotland) Regulations 2011**

Chamber Ref: FTS/HPC/PR/19/3231

**Re: Property at 1 Coplandhill Road, Peterhead, Aberdeenshire, AB42 1GS ("the
Property")**

Parties:

**Miss Myscha Cunningham, 40 Duthie Gardens, Peterhead, Aberdeenshire,
AB42 3FS ("the Applicant")**

**Miss Karen Gibb and Mr Lee Davie, both residing at Aindara 13A, Kirkton, St
Fergus, AB42 3DB ("the Respondents")**

Tribunal Members:

Ruth O'Hare (Legal Member)

Decision

**The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the
Tribunal") determined to make an order for payment against the Respondent in
the sum of Fourteen hundred pounds (£1400) Sterling.**

Background

- 1 By application dated 8 October 2019 the Applicant sought an order for payment as a result of the Respondents failure to lodge her deposit in an approved tenancy deposit scheme.
- 2 By Notice of Acceptance of Application the Legal Member with delegated powers of the Chamber President intimated that there were no grounds on which to reject the application. A Case Management Discussion was therefore assigned for 17th January 2020.
- 3 A copy of the application paperwork together with notification of the date, time and location of the Case Management Discussion was served on both Respondents by Sheriff Officers.

- 4 On 16th December 2019 the Respondents wrote to the Tribunal advising that they would be unable to attend the Case Management Discussion however they wished to make written representations regarding the application. In summary the Respondents explained that the initial lease with the Applicant commenced in February 2014. The second lease commenced on 1 May 2015 and was due to end on 17 September 2019 however the keys were not returned until 21 September 2014. The Respondents explained that they had downloaded the lease agreement from the internet and had used it in good faith. They had not been aware of the requirement to pay the deposit into a scheme and apologised for this. The Respondents then outlined the deductions from the deposit and the reasons for this. They also narrated issues with late payment of rent and the efforts they had made to engage with the Applicants regarding this. Finally they made reference to debt collectors at the property and requested the Applicant advise all relevant parties of their new address. The Respondents apologised for the error in failing to lodge the deposit with a scheme.

The Case Management Discussion

- 5 The Case Management Discussion took place on 17th January 2020. Myscha Cunningham appeared with her partner Alan Hebden as a supporter. The Respondents were not present, as noted in their written representation to the Tribunal in advance of the CMD. The Legal Member therefore determined to proceed in their absence, noting that they had not sought a postponement of the CMD in order to attend in person.
- 6 The Legal Member advised that the Respondents had conceded they were in breach of the Regulations. It was therefore for the Tribunal to determine what level of sanction should be awarded. The Legal Member asked Ms Cunningham to address the Tribunal on what level of sanction she considered appropriate.
- 7 Ms Cunningham advised that in her opinion the maximum amount of three times the amount of the deposit should be awarded. This had been the second tenancy she had entered with the Respondent and on both occasions the deposit had not been registered with an approved scheme. In her view there was no valid excuse. Ms Cunningham noted that the Respondents had apologised but there were no good reasons put forward for why they failed in their duty.
- 8 Ms Cunningham advised that she had in fact made the Respondents aware that there had been a change in the duties regarding tenancy deposits at the start of her second tenancy in 2015. She had done so verbally, as they had a friendly relationship at the time. However the Respondents didn't think it applied to them. The relationship had since deteriorated.

Findings in Fact and Law

- 9 The Applicant and Respondent entered into a tenancy agreement which commenced on 1st May 2015;
- 10 The Applicant paid a deposit of £700 in instalments. The final instalment was paid on 1st July 2016;
- 11 In terms of Regulation 3 of the Tenancy Deposit Scheme (Scotland) Regulations 2011 the deposit should have been lodged in an approved tenancy deposit scheme by 15th August 2016;
- 12 The Respondents did not pay the deposit into an approved tenancy deposit scheme;
- 13 The tenancy terminated on 2nd September 2019;
- 14 The Respondents returned the sum of £13 to the Applicant following deductions from the deposit; and
- 15 The Respondents are in breach of Regulation 3 of the Tenancy Deposit Scheme (Scotland) Regulations 2011.

Reasons for Decision

- 16 The Tribunal determined the application having regard to the application paperwork, the written representations from the Applicant and Respondents and the verbal submissions from the Applicant at the Case Management Discussion. The Tribunal was satisfied that it was able to make a determination of the application at the Case Management Discussion and that to do so would not be prejudicial to the interests of the parties. The written representations from the Respondents had explained that they were unable to attend the Case Management Discussion and they appeared content for the Tribunal to simply rely upon their written representations in the determination of the matter. They had made no request for a postponement.
- 17 The 2011 Regulations specify clear duties which are incumbent on landlords in relation to tenancy deposits. Regulation 3 requires a landlord to pay any deposit received in relation to a relevant tenancy to an approved tenancy deposit scheme within thirty working days of the beginning of the tenancy. The deposit must then be held by the scheme until it can be repaid in accordance with the requirements of the Regulations following the end of the tenancy.

- 18 The Applicant submits that the Respondents did not pay the deposit into an approved tenancy deposit scheme in accordance with their duties under Regulation 3. Having regard to the terms of the correspondence from the Respondents, the Tribunal accepted that this was an accurate statement of fact. The Respondents did not dispute their failure to comply in this regard. The Tribunal noted that the Respondents had retained the deposit at the end of the tenancy having carried out their own assessment of what deductions were required. The Applicant had been given no opportunity to challenge the Respondents' position in this regard. The Respondents had unilaterally made the decision.
- 19 Regulation 9 provides that any tenant may apply to the Tribunal for an order where the landlord has not complied with the duty under regulation 3. Further, under Regulation 10 in the event of a failure to comply, the Tribunal must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit. Accordingly having been satisfied that the Respondents had failed to comply, the Tribunal then had to consider what sanction to impose having regard to the particular facts and circumstances of the case.
- 20 The Tribunal considered the requirement to proceed in a manner which is fair, proportionate and just, having regard to the seriousness of the breach. In doing so the Tribunal took into account the fact that the deposit had remained unprotected for the entire term of the tenancy and the Applicant had been denied access to the independent dispute resolution process that would have been available at the end of the tenancy had the deposit been lodged with a tenancy deposit scheme. Instead, the Respondents had been the sole arbiter in determining what sums, if any, should be returned. They had chosen to retain the entirety of the deposit, with no scrutiny around the reasons for this.
- 21 The Tribunal noted the representations from the Respondents which sought to explain the deductions made from the deposit. However it was not for the Tribunal to consider whether the deductions from the deposit that had been made by the Respondents were justified. That was a matter entirely separate from the determination of the application before it. The Tribunal had to consider the primary aims of the tenancy deposit regulations, not least of which was the benefit of a free and impartial adjudication process at the end of the tenancy which had not been afforded to the Applicant in this case. Regardless of whether or not the Respondents was entitled to retain the deposit, it should have been lodged with a scheme.
- 22 The Tribunal noted the Respondents position that they were not aware of the requirement to place the deposit in a scheme. This contradicted the position put forward by the Applicant at the Case Management Discussion, namely that she had advised them of their duties in this regard. The Tribunal found her evidence to be credible in this regard. However, even if that had not been

the case, the Tribunal did not consider ignorance to be adequate mitigation. It is a Landlord's obligation to ensure that they are aware and that they abide by their obligations under the Regulations. The Respondents had a duty to ensure they understood their obligations under same and to ensure they had complied, however they had failed to do so. The Tribunal did however note that the Respondents had admitted the breach and had expressed remorse in their written representations.

- 23 The Tribunal noted the purpose of Regulation 10, namely to penalise landlords to ensure they comply with the duty to protect and safeguard tenancy deposits. The provisions of Regulation 10 left no discretion where a landlord is found to have failed to comply and permitted an award of up to three times the deposit where a finding of breach is made. Balancing the competing factors in the particular facts and circumstances of this case, the Tribunal considered that a sanction in the sum of £1400 would be appropriate, being twice the deposit. Whilst the Tribunal noted that the Applicant sought the maximum award, the Tribunal considered the circumstances in this case were not serious enough to justify an award of that level.
- 24 The Tribunal therefore made an order against the Respondents in the sum of £1,400.

Right of Appeal

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.


Legal Member/Chair

17/1/25
Date